

1713536 (Migration) [2019] AATA 6940 (10 September 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1713536

MEMBERS: Justine Clarke (Presiding)

John Longo

DATE OF ORAL DECISION: 10 September 2019

DATE OF WRITTEN STATEMENT: 28 October 2019

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211(1) of Schedule 2 to the Regulations
- cl.820.221(1)(a) of Schedule 2 to the Regulations
- r.2.03A

Statement made on 28 October 2019 at 4:42pm

1. **CATCHWORDS**

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – joint bank account – shared household expenses – pooled financial resources – social and public recognition of relationship – mutual companionship and emotional support – engaged – consistent and credible evidence – parties in de facto relationship for 12 months before visa application – decision under review remitted

2.

3. **LEGISLATION**

4. *Migration Act 1958 (Cth), ss 5CB, 65*
Migration Regulations 1994 (Cth), rr 1.09A, 2.03A; Schedule 2, cls 820.211, 820.221

5.

6. **CASES**

7. *He v MIBP [2017] FCAFC 206*

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

8. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
9. At the time of this decision, the applicant is a [age] year old national of Canada.
10. On 24 December 2015, the applicant applied for the visa on the basis of his relationship with his sponsor, Ms [A]. At the time of this decision, the sponsor is aged [number] years.
11. At the time of application, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria include cl.820.211. The primary criteria must be satisfied by at least one applicant.
12. The applicant provided the Tribunal with a copy of the primary decision. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211. The delegate assessed the application pursuant to cl.820.211(2), finding it to be the only subclause relevant in the circumstances. The Tribunal notes that the applicant failed to provide further evidence to substantiate his claim that he was in a committed partner relationship with his sponsor despite specific requests from the Department. The delegate concluded that the information and evidence, submitted in support of the application, was not sufficient to demonstrate that the applicant satisfied the definition of de facto partner under s.5CB of the Act. Accordingly, the delegate found that the applicant did not meet cl.820.211(2).
13. On 26 June 2017, the applicant applied to the Tribunal for review of the primary decision. The applicant has been unrepresented in this review.
14. On 10 September 2019, the applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal gave its decision on the review at the conclusion of the hearing. The Tribunal concluded that the matter should be remitted for reconsideration. The Tribunal notes that upon hearing the oral decision, the sponsor became emotional and shed tears.
15. The following are the reasons for that decision.

CONSIDERATION OF CLAIMS AND EVIDENCE

16. The primary criteria to be satisfied at the time of application are that the applicant is not the holder of a Subclass 771 (Transit) visa and that he meets one of the alternate requirements set out in cl.820.211(2), (5), (6), (7), (8) or (9): cl.820.211(1).
17. The Tribunal has reviewed the applicant's movement records which also detail his visa status at various times. The Tribunal is satisfied that the applicant was not the holder of a Subclass 771 (Transit) visa at the time of application. Therefore, the Tribunal finds that cl.820.211(1)(a) is met.
18. The subclause relevant to the applicant's circumstances is cl.820.211(2). The key issue for determination is whether, at the time of application on 24 December 2015, the applicant was the de facto partner of the sponsor.

19. In the circumstances of this case, the Tribunal considers that it is appropriate to make findings about cl.820.221(1)—a time of decision criterion—as well.

Whether the parties are in a spouse or de facto relationship

20. Clause 820.211(2)(a) and 820.221 require that, at the time the visa application was made and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. The applicant claims to be the de facto partner of the sponsor who is an Australian citizen. The Tribunal notes that a certified copy of the sponsor's certificate of Australian citizenship by descent is on the Department's file. The Tribunal is satisfied that the sponsor is an Australian citizen.

Are the parties in a de facto relationship?

21. 'De facto partner' is defined in 5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
22. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

23. Consideration of the r.1.09A(3) factors

24. In assessing these issues, the Tribunal has had regard to all documents on the Department's and the Tribunal's files as well as the oral evidence given at the hearing.

25. *The financial aspects of the relationship*

26. Any joint ownership of real estate or other major assets, any joint liabilities, the extent of any pooling of financial resources, whether one person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of day-to-day household expenses are relevant factors to consider when assessing the financial aspects of the relationship.
27. There is no evidence before the Tribunal that the parties jointly own real estate or other major assets. There is some evidence of assets. For example, a receipt was submitted to the Tribunal evidencing the purchase of various items of furniture from Ikea in October 2015. The parties' main joint asset is a joint bank account, which the applicant stated that they had opened shortly after he arrived in Australia. The statement for the account which is on the Department's file evidences the account as having been opened in early November 2014. Both the applicant and the sponsor told the Tribunal that this account was currently being used for their savings. While the applicant did not provide recent bank statements to the Tribunal, he did submit a screenshot of a computer listing of the balances in various financial accounts held, including the so-called '[named]' account.
28. Both the applicant and the sponsor gave consistent oral evidence that they have no joint liabilities. The applicant explained that they were trying to get away from credit card debt.

29. There is limited evidence before the Tribunal that either person in the relationship owes any legal obligation in respect of the other. Both the applicant and the sponsor told the Tribunal that they do not have wills. The sponsor gave oral evidence that she has nominated the applicant as the beneficiary of her superannuation and the Tribunal notes that documentary evidence was submitted to both the Department and the Tribunal in this respect. She explained that the applicant does not have a superannuation fund yet. The applicant told the Tribunal that the balance of his superannuation was negligible but that he intended to nominate the sponsor as his beneficiary.
30. With respect to any pooling of financial resources and any sharing of day-to-day household expenses, the applicant and the sponsor gave consistent and detailed evidence about their financial arrangements and how the arrangements had changed over time.
31. In the early stage of the applicant's and the sponsor's relationship in Australia, they claim that they lived with the applicant's cousin (who is also the sponsor's godfather) and his wife and [children]. The sponsor told the Tribunal that this living arrangement had enabled them to save money. The applicant gave oral evidence that they had lived rent-free and had contributed [an amount] per month for petrol costs. He said that he and the sponsor purchased groceries during this time, as he did most of the cooking.
32. The sponsor told the Tribunal that they had had to live very frugally when the applicant did not have a job because she was the main financial provider.
33. Both the applicant and the sponsor gave consistent oral evidence about their own and the other's employment at the time of the hearing. The applicant and the sponsor gave consistent oral evidence that each person's salary was paid into their respective personal bank account. Both parties said that, now that the applicant is working, the applicant is the main contributor of funds into their joint savings account. The applicant explained that the sponsor pays the entire amount of their rent and their utility bills and that he pays for their food, petrol and maintenance for their car, their clothing as well as sundry expenses when they go away for day trips. He acknowledged that their arrangements varied at times, for example, sometimes the sponsor would pay for groceries. The sponsor gave oral evidence that sometimes the applicant will pay some money towards their rent and bills and that this depended on the circumstances at the time. The Tribunal finds that the parties have taken, and continue to take, a flexible approach to the payment of bills and other household expenses.
34. The Tribunal notes that the applicant submitted minimal documentary evidence in support of these claims. For example, he submitted one utility bill in both names, dated 14 July 2018. The Tribunal is not troubled by the lack of documentary evidence as it might be in another case. This is because the Tribunal found both parties' oral evidence to be frank, honest and credible and accepts their oral evidence. Accordingly, the Tribunal finds that, at both the time of application and at the time of this decision, the applicant and the sponsor pooled and pool their financial resources to some extent and shared and share their day-to-day household expenses.
35. The Tribunal gives some weight to the evidence of the financial aspects of the relationship.
36. *The nature of the household*
37. Any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility for housework are matters to be considered when assessing the nature of the household.

38. There is no evidence before the Tribunal that the parties have any children together or are otherwise jointly responsible for the care and support of children.
39. Both the applicant and the sponsor gave consistent oral evidence that they commenced living together when the applicant arrived in Australia; both persons living, at that time, with the applicant's cousin/the sponsor's godfather, his wife and [children]. They gave details of this address and the subsequent properties that they have lived at together, including their current address in [Suburb 1] where they live together with their pet cat and dog. The Tribunal notes the documentary evidence that was filed in support of these claims, being:
- evidence from a real estate agency in January 2015 concerning the parties' residential tenancy agreement and a signed residential premises condition report in respect of a property in [named town] (which is the address referred to in the applicant's application for the visa);
 - the signed schedule of a residential lease for a property in [Suburb 1] for the period from mid-November 2016 to mid-November 2017; and
 - the residential tenancy agreement—albeit not signed or dated—for the parties' claimed present address in [Suburb 1], showing them both as the listed tenants for the period from mid-November 2018 to mid-November 2019.
40. They also gave consistent oral evidence about the sharing of the responsibility for housework, both at the time of application and at the present time. For example, they told the Tribunal that, at present, they both shop for groceries and that, most of the time, the applicant does the cooking and the sponsor does the cleaning.
41. The Tribunal gives weight to the evidence of the nature of the household.
42. *The social aspects of the relationship*
43. Whether the persons represent themselves to other people as being in a de facto relationship to each other, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.
44. The Tribunal has reviewed and considered the two Form 888 statutory declarations that have been made by the sponsor's work colleagues in support of the relationship. The Tribunal notes that this evidence was before the delegate. The applicant did not submit any further statements from either party's friends, or from their families, or nominate any such persons to attend the hearing to give evidence in support of the relationship. While in another case, such a lack of contemporary evidence of the opinion of the persons' families, friends and acquaintances about the nature of the relationship may trouble the Tribunal, it does not do so in this case. This is because, as noted earlier, the Tribunal found the applicant and the sponsor to be credible.
45. With respect to whether the persons represent themselves to other people as being in a de facto relationship to each other, the Tribunal notes and gives weight to the screenshots of the parties' announcement of their engagement on [social media] and the many comments that they received in response.
46. With respect to joint social activities, the Tribunal also notes and gives weight to the evidence of holidays, day trips and attendances at concerts that the couple have taken together over the years.

47. In view of the evidence before the Tribunal, the Tribunal places weight on the evidence of the social and public recognition of the relationship.

48. *The nature of the person's commitment to each other*

49. The duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other, and whether the persons see their relationship as long-term are all aspects to be considered in determining the nature of the person's commitment to each other.
50. The Tribunal notes that the applicant and the sponsor each made relationship statements which are on the Tribunal's file. At the hearing, the parties provided a broadly consistent account of the inception and development of their relationship. The evidence before the Tribunal is that the parties have been in an exclusive and committed relationship for almost six years, having first met in Canada in 2013. The Tribunal gives weight to the evidence of the duration of the relationship as well as the length of time during which the persons have lived together (since early January 2014).
51. With respect to the degree of companionship and emotional support that the persons draw from each other and whether the persons see their relationship as long-term, the Tribunal notes the applicant's undated statement filed with the Tribunal in September 2018 where he stated:

52. We literally spend most of our time together. Outside of [Ms A] working, there is rarely a moment in which we are apart from one another. We have been together for over 5 years, consistently. We have lived together for almost as long. We started living together when we both came to Australia, and have been inseparable ever since. We are planning a life for us, long term. Looking at where we want to live, if we should build or buy an already built house. Planning on retirement together, and how that would look. I am very much an emotional rock for [Ms A]. She has issues with anxiety, and depression, and I am here emotionally for her, and actively aid her in her journey to get better. I see her as an extension of myself. An accompaniment of the values/virtues I deem positive of myself, and she's a betterment for the not so great virtues of myself.

53. The Tribunal notes that the parties are engaged to marry and the Tribunal views this as a strong indicator that they see their relationship as long term.
54. The Tribunal notes that the applicant and the sponsor gave credible and consistent oral evidence at the hearing about all of these and related matters. The applicant also submitted pages of text messages that had been exchanged between the parties which evidence their mutual companionship and emotional support. The Tribunal gives weight to all of this evidence.
55. The Tribunal has no reason to doubt the truthfulness of the evidence that has been submitted. Having considered all the evidence cumulatively, the Tribunal is satisfied that the applicant and the sponsor have demonstrated, and continue to demonstrate, a level of commitment to one another and to their de facto relationship as contemplated in the Regulations. The Tribunal gives great weight to the evidence of this factor.

56. *Conclusion on s.5CB(2) requirements*

57. For the reasons given with respect to the r.1.09A(3) factors, the Tribunal is satisfied that both at the time of application and at the time of this decision, the applicant and the sponsor:

- were not and are not in a married relationship (for the purposes of s.5F of the Act) with each other;
- had and have a mutual commitment to a shared life to the exclusion of all others, as required by s.5CB(2)(a) of the Act;
- had and have a genuine and continuing relationship, as required by s.5CB(2)(b) of the Act; and
- lived and live together, as required by s.5CB(2)(c)(i) of the Act.

58. Section 5CB(2)(d) of the Act requires that the parties not be related by family. There is nothing in the information before the Tribunal to suggest that the parties are related by family. To the contrary, in his record of responses for the visa application that is on the Department's file, the applicant declared that he is not related to the sponsor by blood, marriage or adoption. The Tribunal accepts the veracity of this statement and finds that the applicant and the sponsor are not related by family. Section 5CB(2)(d) of the Act is met.
59. On the basis of the above, the Tribunal is satisfied that the requirements of s.5CB(2) are met both at the time the visa application was made and at the time of this decision. Therefore, the applicant meets cl.820.211(2)(a)(i).
60. However, the de facto or spouse requirement in cl.820.211(2)(a)(i) is not the only requirement in cl.820.211(2) which must be satisfied.

61. Time of application and time of decision requirements

62. The sponsorship requirements in cl.820.211(2)(a)(ii) and cl.820.211(2)(c) must also be satisfied, and, if the applicant was not the holder of a substantive visa at the time of application, then the requirements in cl.820.211(2)(d) must also be satisfied.
63. The Tribunal has reviewed documents on the Department's hard copy file but notes that the sponsorship for a partner to migrate to Australia form (Form 40SP) is not included. Nevertheless, the Tribunal notes that the delegate referred to Ms [A] as the sponsor in the primary decision. Ms [A] attended the hearing in the role as the applicant's partner and sponsor. There is no information before the Tribunal to suggest that the applicant is not sponsored Ms [A] or that the circumstances outlined in cl.820.211(2B) apply. Accordingly, the Tribunal is satisfied that the applicant is sponsored by Ms [A] and that cl.820.211(2)(c)(i) is met and that Ms [A] is not prohibited by cl.820.211(2B) from being a sponsoring partner. Accordingly, the Tribunal also finds that cl.820.211(2)(a)(ii) is met.
64. The applicant's movement records evidence him as having been granted a [temporary] visa on 30 December 2013. He held this substantive visa upon applying for the Partner (Temporary) (Class UK) Subclass 820 visa on 24 December 2015. As the applicant held a substantive visa at the time of application, the further requirements in cl.820.211(2)(d) need not be met.
65. The Tribunal finds that the applicant meets the time of application requirements in cl.820.211(1) as he meets the requirements in cl.820.211(1)(a) and (b), the latter on the basis of meeting all the requirements in cl.820.211(2).
66. With respect to criteria to be satisfied at the time of decision, the Tribunal finds that the applicant continues to meet the requirements of cl.820.211(2) and so meets cl.820.221(1)(a).

67. The Tribunal finds that the applicant meets cl.820.211(1) and cl.820.221(1)(a) of Schedule 2 to the Regulations.

Are the additional criteria for a de facto relationship met?

68. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
69. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
70. There is no evidence that the relationship is registered under a relevant State or Territory law or that the sponsor held, holds or is applying for a permanent humanitarian visa, so they must meet the 12 month requirement.
71. In their relationship statements that were filed with the Tribunal, both the applicant and the sponsor explained that they committed to their relationship [in] November 2013—when they were both living in Canada. At the hearing, they gave broadly consistent oral evidence about the inception and development of their relationship. However, while both knew that the [specified day] was the day in the month that they committed to an exclusive relationship, the applicant could not recall the month and the sponsor told the Tribunal that it had been April. The applicant told the Tribunal that he had a bad memory for dates. The Tribunal is not concerned that the applicant and the sponsor could not recall the month in 2013 that they committed to their relationship.
72. The applicant and the sponsor gave consistent oral evidence that they commenced living together in a partner relationship when the applicant arrived in Australia, which the Tribunal notes from his movement records was [in] January 2014. They both said that there had been no significant gaps of time since that date when they had not lived together. The Tribunal found both parties to be highly credible witnesses so it accepts their evidence in this regard.
73. On the basis of the oral evidence as well as some documentary evidence (for example, evidence that the joint bank account was opened in early November 2014 and of flights booked for both parties to travel to [Country 1] in December 2014) before it, the Tribunal is satisfied that the applicant had been in the de facto relationship with the sponsor for at least the 12 month period ending immediately before the date of the application on 24 December 2015.
74. For these reasons, the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.

CONCLUSION

75. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

76. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211(1) of Schedule 2 to the Regulations
 - cl.820.221(1)(a) of Schedule 2 to the Regulations
 - r.2.03A

77.

Justine Clarke
Member

John Longo
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).